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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 664

SIMON STALLSWORTH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Simon Stallsworth, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decision of the Court which affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division. A petition for a new hearing was denied by the Court of Appeals on February 19, 1952. The petitioner was tried by a jury in the District Court and was found guilty of violating Sec. 2593(a) of Title 26, U.S.C., charging him with the possession of marihuana. The judgment of the District Court upon the verdict of guilty

was that the petitioner be sentenced to two years in the custody of the Attorney General. A transcript of the record in the case, including the proceedings in said Court of Appeals, is furnished herewith in compliance with Rule 38 of the Rules of this Court.

Statement of Matters Involved.

The petitioner was found guilty by a jury in the District Court of being a transferee of marihuana without having paid the required transfer tax and without having a proper order form in accordance with Sec. 2593(a) of Title 26, U.S.C.

It was necessary, in order for the Government to prove its *prima facie* case, to show that the petitioner had marihuana in his possession, which marihuana was in fact illegal in accordance with Sec. 3238(b), Title 26, U.S.C.; and that after reasonable notice and demand for the order form by the Deputy Collector of Internal Revenue the petitioner did not produce the said order form; and that the petitioner was a transferee of the marihuana in the District wherein the indictment lay. It was further presented to the Court of Appeals that the Trial Court erred in limiting the cross-examination of the Government chemist in order to determine whether or not the substance was in fact marihuana in accordance with the definition of the Act.

Jurisdiction.

Jurisdiction of this Court is invoked under Sec. 1254, U. S. Code, Title 28. (Judiciary and Judicial Procedure, Title 28, Chap. 646, Public Law 773, 80th Congress).

The judgment of the United States Court of Appeals for the Seventh Circuit to be reviewed was entered on the 19th day of December, 1951.

Questions Presented.

1. Whether the Government proved proper venue. The Marihuana Tax Act, under which petitioner was prosecuted, requires that the Government shall prove the defendant to be a transferee (Sec. 2593(a) Title 26, U.S.C.).

2. Whether the Government properly proved the notice and demand for the order form in accordance with the aforesaid Section.

3. Whether the Government proved that the marihuana in question was in fact marihuana in accordance with the statutory definition as set out in Sec. 3238(b) Title 26, U.S.C.

Reasons Relied On for the Allowance of the Writ.

The petitioner's appeal raises important questions of statutory construction and constitutional law which have never been, but ought to be decided by the Supreme Court.

1. Sec. 2593(a) of Title 26, U.S.C. pertaining to the presumption of being a transferee of marihuana in the event one is found in possession of marihuana, providing certain other facts are proved, *has never been interpreted by this Court in connection with the question of venue.* There have been no decisions by this Court with respect to the venue question in connection with Sec. 2553(a) and 2554 of Title 26, U.S.C. pertaining to narcotics —opium and coca leaves or their derivatives— since this Court ruled in a 5 to 4 decision on the question of venue in the case of *Casey* v. *U. S.* 276, U. S. 413. We respectfully submit that the question with respect to being a transferee of marihuana presents a different venue question than that decided by this Court in the *Casey* case. Considering the growing number of prosecutions under

the Marihuana Tax Act we believe that a clarification and a clear-cut decision by the Supreme Court is necessarry for a proper interpretation of the venue question in connection with Sec. 2593(a), Title 26, U.S.C.

2. This Court has never decided a case in connection with the Marihuana Tax Act involving the proper interpretation of what is reasonable notice and demand for the order form in accordance with Sec. 2593(a) of Title 26, U.S.C. The said Act requires that such an order form be demanded by the Collector of Internal Revenue after reasonable notice is given to the defendant. It is respectfully submitted that the Court of Appeals erred when in its opinion it stated that "It is admitted that a • • • Deputy Collector asked the defendant to produce the form • • • and that defendant answered 'no' ". (Tr. 65). It is submitted that nowhere in the Transcript of Record in the examination or cross-examination of the Deputy Collector can it be fairly stated that "it is admitted" that such a demand was made.

3. The question is presented for the first time to this Honorable Court since the passage of the Marihuana Tax Act in 1937 as to whether or not the Government proved that marihuana was marihuana in accordance with the statutory definition (Sec. 3238(b) Title 26, U.S.C.). It was urged in the Court of Appeals that the Trial Court erred in limiting the defense in the cross-examination of the Government chemist. The Court of Appeals overlooked the fact that the said Section described different parts of the plant Cannabis as being prohibitive and described other parts of the plant as *not* being prohibitive.

Wherefore, the petitioner prays that the Writ of Certiorari be issued under the seal of this Court, directed

to the United States Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court on a date to be designated, a full and complete Transcript of the Record and all proceedings had in this cause, numbered on its docket 10462, to the end that this cause may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Seventh Circuit be reversed by this Court, and that your petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

JULIUS LUCIUS ECHELES,
Counsel for petitioner.

IN THE

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OCTOBER TERM, A. D. 1951.

No.

SIMON STALLSWORTH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the United States Court of Appeals for the Seventh Circuit in this cause, No. 10462, is reported in *United States* v. *Simon Stallsworth,* decided on December 19, 1951. The Opinion in this case appears at pp. 64 to 69 inclusive in the Record filed herein.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254, Title 28, U. S. Code (Judiciary and Judicial Procedure). The judgment of the Court of Appeals was entered and the opinion filed on December 19, 1951. The Court denied a petition for rehearing on February 19, 1951. (Tr. 71).

Specification of Errors.

The Court of Appeals erred in ruling contrary to the petitioner on each of the questions as set forth in the Petition.

Statement of the Case.

The petitioner herein was indicted on one count charging him with being a transferee of marihuana in violation of Sec. 2593(a), Title 26, U. S. Code. A jury returned a verdict of guilty as laid in the indictment.

The issues on this appeal arise out of the rulings of the Trial Court in failing to direct a verdict of not guilty, for the reasons that the Government did not prove proper venue; did not prove proper notice and demand for an order form in accordance with the Section of the Act alleged to have been violated; and did not prove that the marihuana was indeed contraband marihuana in accordance with the definition contained in Sec. 3238(b) of Title 26 U. S. Code. It is submitted also that the Trial Court erred in unduly restricting the defense cross-examination of the Government chemist on the point of the identification of the alleged contraband marihuana.

ARGUMENT.

I.

The Government failed to prove proper venue; therefore the court was without jurisdiction.

In support of the defendant's motion for a new trial the defendant raised the issue, amongst others, that the government failed to prove proper venue in the case in that the government failed to prove that the defendant was a transferee of marihuana in the Northern District of Illinois, Eastern Division. The government, in order to sustain the charge of the indictment, presented evidence to prove that the defendant was arrested in the City of Chicago and that he had in his possession a quantity of alleged marihuana. (Tr. 6-9). The Sixth Amendment to the Constitution of the United States requires that venue be alleged and be proven. It is to be noted that the defendant is not charged with possession of marihuana, but is charged with being a transferee (Indictment Tr. 2). All the government proved was possession in Chicago; however, possession of marihuana in any jurisdiction is not the same as having had it transferred to the person possessing it in order to make him a transferee liable for the tax. The presumption afforded by the statute does not avail to infer venue.

In the case of *DeBellis* v. *U. S.*, 22 F. (2d) 948, the court stated on p. 948, as follows:

> "Count I * * * charges an unlawful purchase of the drugs mentioned. The point made upon this count is that the evidence is not sufficient to warrant a conviction upon it. *The only evidence to sustain the purchase alleged was the possession of narcotics. There*

is no proof as to venue. We held in *DeMoss* v. *U. S.*, 14 F. (2d) 1021, that the mere possession of narcotics in the district is not sufficient to support the averment that it was purchased in the district." (Emphasis added.)

In the case of *DeMoss* v. *U. S.*, 14 F. (2d) 1021, the Court of Appeals adopted *in toto* the decision in *Brightman* v. *U. S.*, 7 F. (2d) 532 to the effect that the presumption of unlawful purchase from the fact of possession of drugs does not extend to venue, and transfer within the jurisdiction must be shown. In the *Brightman* case it was stated (p. 533) that:

> "*The presumption of the statute alone, however, was not sufficient for conviction.* Before the defendant could properly be convicted, it was necessary for the government to go further and prove that the venue was the Western District of Oklahoma. This was a prerequisite to a conviction, and the foundation of this prerequisite is contained in the Sixth Amendment to the Constitution of the United States, which provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.' *Wharton Crim. Ev.* (10th Ed.) Sec. 106a; *Vernon* v. *United States,* 146 F. 121, 76 CCA 547 (this court); *Moran* v. *United States,* (C. C. A.) 264 F. 768; *Underwood* v. *United States,* (C. C. A.) 267 F. 412; *Tuckerman* v. *United States,* (C. C. A.) 291 F. 958, 967." (Emphasis added.)

We are familiar with the case of *Casey* v. *U. S.*, 276 U. S. 413, wherein one of the questions raised was that of venue. The *Casey* case was cited to the Trial Court in rebuttal of the defendant's contention that no venue was proven. We believe that a proper reading and a proper application of the *Casey* case does not negative our point,

but rather bolsters and supports our argument. We believe it to be of such considerable importance on the point of venue that we desire to stress the exact wording of the Court, which will show the Supreme Court's reasoning for its ruling in the case. Although the *Casey* case refers to the Anti-Narcotic Act, a similar presumption exists with respect to the Marihuana Tax Act. The opinion of the majority of the Court is a rather short one and contains discussion of two points: Venue, and the Question of Entrapment. With respect to Venue, the Supreme Court stated:

> "The amended section makes the purchase, sale etc. of opium and derivatives unlawful except in or from the original stamped package, and the absence of the required stamps from any of the said drugs 'shall be prima facie evidence of a violation of this section by the person in whose possession same may be found.' For the petitioner it was argued that the presumption thus created does not and, consistently with the Sixth Amendment to the Constitution, cannot extend so far as to show a purchase within the district and thus to bring the case within the jurisdiction of the Trial Court. The Circuit Court of Appeals answered that the objection to the venue was not raised specifically below. The Court was asked to direct a verdict for the defendant on the ground that the evidence was not sufficient and elsewhere it has been held that such a request is enough to save the question, and that a presumption extended to the place of purchase could not be upheld. *Brightman* v. *United States,* 7 F. (2d) 532. *Cain* v. *United States,* 12 F. (2d) 580. *Hood* v. *United States,* 14 F. (2d) 925. *De Moss* v. *United States,* 14 F. (2d) 1021. **But we are of opinion that upon the facts of this case the Court was right. If the jury believed that the defendant, long established in Seattle, said that he had not the drug but would, and shortly thereafter did, furnish it, the inference that he bought it in Seattle is strong,** and it is reason-

able to suppose that if attention had been called to the point the inference could have been made stronger still. But the effort of the defence did not stop at this detail but was to show that Casey had nothing to do with the business and was wholly innocent of the offence charged." (pp. 417-18.) (Emphasis added.)

It is to be clearly noted that the *Brightman, De Moss* and *De Bellis* cases (*supra*) *are not* overruled. They are referred to and identified as cases bearing upon the question in point. The Court stated, however:

"• • • UPON THE FACTS OF THIS CASE THE COURT WAS RIGHT."

What were the facts of the case? That the defendant said he did not have the drug, but that he would *shortly* thereafter furnish it, and that he did furnish it shortly thereafter. The Supreme Court then said that the inference that he bought it in Seattle is strong. It seems to us in any discussion we have read of the *Casey* case that this salient point is completely overlooked. The Supreme Court did not decide that venue could be inferred from mere possession; it did decide that there were sufficient facts in the trial of the case to warrant the inference that the defendant could not have left the jurisdiction of the court within the short time available to him in order possibly to have purchased the narcotics outside the jurisdiction. NO SUCH FACTS EXIST IN THE INSTANT CASE. ALL THAT COULD BE PROVED IS THAT DEFENDANT HAD THE ALLEGED MARIHUANA IN HIS POSSESSION.

The Court of Appeals seems to have been motivated in its ruling on the question of venue by the fact that, as it stated, the question of venue "should, in fairness to the Trial Court, have specifically raised the question in his motions in the Court below". (Tr. 67).

In the Petition for Rehearing filed with the Court of Appeals and denied on February 19, 1952, it was specifically pointed out that the question of venue was raised in the Trial Court in arguing the defendant's motion for a new trial. The point was raised and argued before the Trial Court and the defendant filed a brief in support of the said motion. The argument and the motion were omitted from the Designation of the Record to be printed in accordance with Rule 14(b) of the Rules of the Court of Appeals for the Seventh Circuit. It was pointed out to the Court of Appeals in the Petition for Rehearing that in the opening paragraph of the Government's reply brief before the Trial Court on the question of venue it was stated that:

> "Examination of the defendant's brief in support of his motion for a new trial in the captioned matter discloses his contentions to be:
>
> (a) *The Government failed to prove venue in the case.*
>
> (b) *There is insufficient evidence to sustain the verdict of the jury.*"

We submit that the Court of Appeals was unduly of the opinion that the venue question was not raised in the Trial Court. We respectfully point out that there is no contention on the part of the Government that the question was not raised and properly presented to the Trial Court.

We respectfully submit therefore that there was a total lack of proof as to venue and that therefore the Trial Court had no jurisdiction over the person of the defendant. We also respectfully submit that the Court of Appeals erred in being influenced by its review of the record in holding that the question was not raised before the Trial Court. We respectfully submit therefore

that this Court ought to take jurisdiction in order that the venue question may be decided for the first time by this Court in connection with the Marihuana Tax Act.

II.

The Government failed to prove proper notice and demand for the order form in accordance with Section 2593(a) of Title 26 U. S. Code.

One of the essential steps in proving a violation of Section 2593(a) of Title 26 U. S. Code is the making of a demand by the Collector of Internal Revenue after reasonable notice to produce the order form required by Section 2591 to be retained by all transferees. The language in Section 2593(a) requires this, because it states:

> "It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, *after reasonable notice and demand by the collector,* to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a)." (Emphasis added)

The only proof adduced with respect to the notice and demand is the testimony of the government witness Eickenberg, which appears on pp. 19-24 of the transcript. We respectfully submit that any fair reading of both the direct examination and the cross examination of the collector will show that the so-called demand was an improper demand, and will further conclusively show that there was no notice given, reasonable or otherwise, prior to the so-called demand. We respectfully invite the attention of the reviewing court to the only statement related by the witness which he testified he made to the defendant.

Witness Eickenberg testified that he "asked him to produce an order form required by Section 2591(d)". (Tr. 20.) Upon cross-examination the witness testified that he did not give the defendant any notice before he asked the question above referred to. (Tr. 22.) The witness further did not know what form number he was asking for. (Tr. 23.)

It is significant that although upon direct examination the witness testified that he had asked the defendant "to produce an order form required by Section 2591(d)" (Tr. 20), the prosecution seemed to think it was necessary to ascertain what particular Section the witness had referred to. The following examination then took place (Tr. 20):

> "Q. When you refer to Sec. 2591(d), to what are you referring?
>
> A. Title 26 U. S. Code.
>
> Q. U. S. Code? What do you mean by that?
>
> A. U. S. Code, and his reply was just one word, 'No'. That is as much as I ever said to him and all he said to me."

The significant interpretation about this unusual testimony is that it apparently became necessary to ascertain from the witness what the *witnesses* had reference to in asking the question in manner and form as he did. We believe it to be the view of law that when a question is asked it is the auditor who must have knowledge as to what the speaker has reference. What merit any kind of questioning if the listener cannot apprehend the language, or cannot understand what the speaker is talking about? We respectfully point out that the speaker himself did not know specifically what he was talking about, for the reason that he did not know the form number of the form about which he was speaking; he further did not set out specifically in his interrogation of the defendant in what context he used Sec. 2591(d). It was the astute govern-

ment prosecutor who realized the omission and attempted to supply it by asking the question "When you refer to Sec. 2591(d) to what are you referring?" However, Title 26 U. S. Code was not mentioned to the defendant. For all he knew, and for all any one knew, Sec. 2591(d) is completely in a vacuum to that defendant or to any person. There is no specific reference to the Marihuana Tax Act, no inference, direct or otherwise, that it pertains to the possession of marihuana. In reading the transcript this Court will observe that the alleged conversation took place in the corridor of the Municipal Court Building of the City of Chicago, outside a courtroom where the defendant was discharged by the Municipal Court Judge on a charge relating to marihuana. (Tr. 17-18.) How could this defendant know what the witness Eickenberg was talking about or to what he had refference when he was asked "to produce an order form required by Sec. 2591(d)". Without any other explanation —and there is none—what could the defendant, or anyone, answer. In the case of *Kalos* v. *U. S.*, 9 F. (2d) 268, the Court stated on p. 271 that: "Language as well as conduct must be understood before the person in whose presence it is made, can be assumed to have acquiesced therein".

When the Congress enacted Section 2593(a) of Title 26 U. S. Code it set out certain procedures and steps whereby the government is required to proceed before it can prove that a particular defendant is a transferee of marihuana. The United States Court of Appeals stated in the case of *Nigro* v. *U. S.* 117 F. (2d) 624 at p. 629, that

> "The omission of Congress to make the Act of a drug addict in purchasing narcotics to satisfy his cravings an offense, except in circumstances expressly referred to, is evidence of an affirmative legislative policy to leave the purchaser unpunished except in such circumstances."

We respectfully submit that where such a very limited and very confused conversation took place between the deputy collector, *who did not identify himself to the defendant*, there cannot be a conviction. The so-called proof is totally and completely insufficient to meet the requirements of Sec. 2593(a); and it was the duty of the Court to direct a verdict of Not Guilty upon the defendant so moving at the close of the government's case (Tr. 51), and again at the close of all the evidence (Tr. 52). We refer again to the testimony of the witness Eickenberg (Tr. 19-20):

> "Q. Did you have a conversation with him (defendant) at that time and place, Mr. Eickenberg?
> A. Hardly a conversation; *I merely asked him one question* • • •
>
> Q. What did you say to Stallsworth and what did he say to you?
> A. I asked him to produce an order form required by Sec. 2591(d)".

THE ABOVE REPRESENTS ALL OF THE QUESTIONING WITH RESPECT THE ORDER FORM REQUIRED UNDER SECTION 2593(a).

Observe the circumstances: A crowded corridor of the Municipal Court (Tr. 21); the defendant having just had a complaint against him dismissed (Tr. 17); the witness Eickenberg failing to identify himself to the defendant (Tr. 19-20); the questioning itself which had no reference to marihuana and no reference to any law of the United States, but merely "Section 2591(d)" (Tr. 20). We respectfully submit that the notice and demand required by the Congress in Sec. 2593(a) of Title 26 U. S. Code has some meaning and legal body; that to permit a conviction under the proof adduced at this trial is to make a mockery of the requirements as set down by Congress.

We respectfully ask this Court to allow the Writ of Certiorari for the purpose of deciding what kind of proof

is necessary in order to satisfy the statutory provisions of Sec. 2593(a), Title 26, U.S.C. We respectfully submit that this Court had never passed on the question since the passage of the Marihuana Tax Act in 1937.

III.

The Government failed to prove that the marihuana found was in fact illegal in accordance with the statutory definition of the term.

The court erred in limiting the cross-examination of the Government chemist.

The government failed to prove beyond a reasonable doubt that the marihuana in question was of the kind prohibited by law. Section 3238(b), Title 26 U. S. Code, defines marihuana as follows:

> "The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination."

It is clear therefore that there are divisible parts of the marihuana plant, and that it is only the parts described in detail which constitute the illegal substance. The reason for this distinction is obvious when it is understood that there are a number of legitimate commercial uses derived from the marihuana plant. Fiber, rope, coarse cloth are all made from the stalk; red oil is obtained from the leaves as a painter's oil; seed is used as birdseed, and

even the leaves have beneficial medicinal effect. U. S. Dispensatory, 23rd Ed. p. 3000.

In addition to the fact that the government only established by its direct examination that the substance under examination was marihuana—but not what kind of marihuana—the court unfairly limited defendant's counsel in his cross-examination of the chemist. We believe that the limitations placed upon the cross-examiner of the chemist were such as to preclude an accurate determination by the chemist of what his opinion could be under the circumstances. It will be observed that the only material proof on direct examination of the chemist appears as follows: (Tr. 30)

> "Q. What is your opinion, Mr. Endriz?
> A. It is a product called marihuana.
> Q. What is the physical description of the contents of that envelope, Mr. Endriz?
> A. It is a sort of flaky, green flaky leafy substance containing cystolith hairs."

Upon cross examination the chemist admitted that by simply making a physical examination and determining that there were cystolith hairs only there could be no accurate determination that the substance under consideration was marihuana. (Tr. 31.) However, the chemist testified that he made several chemical tests and that all the chemical tests proved that the substance was marihuana. (Tr. 34-35.) In cross-examining the chemist, however, to determine both the extent of his knowledge of the subject of marihuana and whether or not he could properly determine that it was marihuana in accordance with Sec. 3238 (b) of Title 26 U. S. Code as above quoted, he was asked whether or not he could determine from what part of the world the marihuana came. He could not. (Tr. 35.) He was asked whether the plant under consideration was pistillate or staminate. His answer was that he did not make

any such determination. (Tr. 35.) In attempting to obtain from the witness a definition of the term cannabis sativa as indicated in the Act, counsel for defendant was prevented from doing so by government counsel's objections and the Court's sustaining said objections. (Tr. 36-42.) We ask this Court to pay particular attention to the cross-examination on pp. 35 to 42 of the Transcript. It will appear there that the chemist could not determine whether the substance was male or female (Tr. 35); could not determine from what part of the world the marihuana under consideration came (Tr. 35); could not determine whether the seeds were sterilized or unsterilized (Tr. 42); did not answer the question as to whether or not he was able to determine whether the marihuana was mature or immature. (Tr. 42.) The chemist, on direct examination, however, did state that in addition to material other than seeds, stems, and fiber, the material also contains leafy tops. (Tr. 42.)

We submit that as a whole the chemist's answers did not prove that the marihuana under consideration was marihuana in accordance with the Act. **The mere fact that it was marihuana does not make the substance illegal.** The Act distinguishes between certain parts of the marihuana plant. Indeed, in the case of *People* v. *Sowrd,* 370 Ill. 140, the Court stated that "POSSESSION OF MARIHUANA IS NOT A CRIMINAL OFFENSE UNLESS IT IS OF THE SPECIFIC QUALITY AND KIND DEFINED BY THE STATUTE."

In that case, decided in 1938, there was an Information charging the defendant with having in her possession marihuana. The Illinois Act defined cannabis as being "the dried, flowering or fruiting tops of the pistillate plant from which the resin has not been extracted". The Court stated (p. 177):

> "If it be conceded that marihuana is Cannabis sativa L. yet it is obvious that in order to constitute an offense that the marihuana alleged to be possessed was from the dried, flowering or fruiting tops of the plant, and that the resin had not been extracted."

The Court in that case reversed the conviction because the charge in the Information was insufficient. How much more then is necessary for proof of the charge if it be held that the charge in the indictment is insufficient. We submit that a fair reading of the entire evidence given by the government chemist in the instant case fails to prove the identity of the marihuana in accordance with the Act.

We would like to point out that the prohibition against the possession or transfer of marihuana, except in accordance with the provisions of the Marihuana Transfer Act, is a relatively recent addition to the Narcotics Laws. The Marihuana Tax Act was passed in 1937, and for the first time the United States attempted to control the traffic in marihuana. Prior to that time a number of states had laws which had for their design the prohibition of the sale or possession of marihuana. But neither the Narcotic Drugs Import and Export Act, passed in 1909, Title 21, U. S. Code, Sec. 171, nor the Harrison Anti-Narcotic Act, passed in 1914, Title 26 U. S. Code, Chap. 23, included marihuana in its list of prohibited narcotics.

There is no testimony anywhere that the chemist determined that the resin had not been extracted; indeed, to the specific question with respect to the sterilized or unsterilized seeds, the chemist answered that he did not make any determination. (Tr. 42.)

We believe it to be proper to quote from what in our opinion is the most completely authoritative source of information on the identity and analysis of marihuana.

In the book entitled "The Marihuana Problem in the City of New York: Sociological, Medical, Psychological, Chemical and Pharmacological Studies" by the Mayor's Committee on Marihuana (The Jaques Cattel Press, 1944) there appears the following (pp. 151-152):

"The numerous preparations having marihuana activity are all obtained from members of the *Cannabinaceae* family. These are usually distinguished from the common hemp by differences in their geographical origin; for example, plants with marihuana activity are found in the Americas ('Cannabis Americana' in the United States of America and Mexico ('marihuana,' 'marijuana') and in Brazil ('maconha), as well as in Africa and Asia ('Cannabis indica,') in India ('bhanga,' 'ganja'), Arabia and Persia ('hashhish,' mainly designating the resin), China ('Cannabis sinensis,' 'Ma'), North and West Africa ('diamba,' 'riamba') and South Africa ('darha') and also in Italy and Roumania.

"Two circumstances have contributed to a breakdown of botanical distinctions: 1) The demonstration of marihuana activity in hemp weeds from a moderate climate, as for instance in plants grown on vacant lots in the vicinity of New York City. 2) The investigations underlying the inclusion of marihuana in the Federal Tax Legislation of August 2, 1937. Since then it has been generally acknowledged that the source of all preparations with marihuana activity is Cannabis sativa Linn., the common hemp.

"*The main source of marihuana preparations is the tops of female plants at or shortly after the peak of the period of flowering. The flowering female tops are especially rich in resinous exudate.* The amount of this exudate is sometimes increased by special measures such as removal of male plants from the fields, early cutting of larger leaves, and dwarfing the entire plant. Where the exudation is plentiful, preparations are made up from the resin by beating, kneading and

pressing after freeing the harvested tops from leaves, stalks and twigs. This resinous material is used by preference in Oriental countries and is variously prepared for smoking, chewing, eating or even snuffing. However, the entire leaf is sometimes used for preparing potions or confections, or for preparing cigarettes with or without added tobacco. The resin itself can also be collected in the field by dusting, beating, scraping or rubbing it from tops, leaves, stalks and twigs. Seeds are present as additional components in some preparations, particularly confections, and there are indications that they are sometimes used alone in crushed form.

"Many misinterpretations regarding the potency of products obtained from various hemps, as well as from various parts of the plant, can now be attributed to a pharmacognostic error, namely, the use of chemical reaction which, while sufficiently specific for the hemp herb, cannot be attributed to the active components. According to present opinion, the marihuana activity is related to the oil content." (Emphasis added.)

Taken as a whole it will be seen therefore that the chemits's testimony, especially in view of the limitations placed upon the cross-examination of the chemist, does not meet with the statutory definition of marihuana. It is therefore respectfully submitted that on this score the judgment of the Trial Court be reversed.

CONCLUSION.

We respectfully submit that because the several points raised upon this appeal for a Writ of Certiorari have never been passed upon by this Court, and further, because the Court of Appeals seems to have been unduly influenced in wrongly regarding that the question of venue was not presented to the Trial Court; that therefore this case requires that this Court grant a Writ of Certiorari to the Court of Appeals for the Seventh Circuit, and that upon hearing of the issues, make its decision known.

Respectfully submitted,

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997458—52

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 664

SIMON STALLSWORTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 64–69) is reported at 193 F. 2d 870.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1951, and a petition for a rehearing was denied on February 19, 1952 (R. 70–71). The petition for a writ of certiorari was filed on March 19, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether evidence of petitioner's possession of marihuana without the required statutory order form was sufficient to prove venue of the illegal transfer of the drug.

2. Whether there was sufficient evidence of reasonable notice and demand by a deputy collector upon petitioner for the production of the order form required for the legal transfer of marihuana.

3. Whether there was sufficient evidence to prove that the substance found in petitioner's possession was marihuana within the statutory definition.

4. Whether petitioner's counsel was unduly limited in the scope of his cross-examination of a chemist testifying as to the nature of the marihuana.

STATUTES INVOLVED

26 U. S. C. 2553 (a) (53 Stat. 271, as amended, 58 Stat. 721) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package contain-

ing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

26 U. S. C. 2591 (a) and (d) (53 Stat. 280) provides:

> (a) It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.
>
> * * * * *
>
> (d) Each such order form sold by a collector shall be prepared by him and shall include an original and two copies, any one of which shall be admissible in evidence as an original. * * * The copy given to the purchaser by the collector shall be retained by the purchaser and preserved for a period of two years so as to be readily accessible to inspection by any officer, agent, or employee mentioned in section 2595. * * *

26 U. S. C. 2593 (a) (53 Stat. 281) provides:

> (a) It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any

person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

26 U. S. C. 2597 (53 Stat. 282) provides:

It shall not be necessary to negative any exemptions set forth in this subchapter or part VI of subchapter A of chapter 27 in any complaint, information, indictment, or other writ or proceeding laid or brought under this subchapter or part VI of subchapter A of chapter 27 and the burden of proof of any such exemption shall be upon the defendant. In the absence of the production of evidence by the defendant that he has complied with the provisions of section 3231 relating to registration or that he has complied with the provisions of section 2591 relating to order forms, he shall be presumed not to have complied with such provisions of such sections, as the case may be.

26 U. S. C. 3238 (b) (53 Stat. 387) provides:

(b) The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not in-

clude the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

STATEMENT

Petitioner was tried under an indictment in the United States District Court for the Northern District of Illinois charging him as a transferee of a quantity of marihuana subject to payment of the tax imposed by 26 U. S. C. 2590 (a), and with having unlawfully obtained the marihuana without having paid the tax in violation of 26 U. S. C. 2593 (a) (R. 2). He was found guilty and sentenced to imprisonment for two years (R. 53–55). On appeal, the judgment was unanimously affirmed (R. 55–56, 70).

The evidence adduced at the trial may be summarized as follows:

On the evening of August 25, 1950, three federal narcotics agents were following petitioner, who was suspected of violating the narcotics laws. After petitioner parked his automobile in front of 343 East 47th Street in Chicago, Illinois, and started to talk to another person on the street, one of the agents informed petitioner that he had a warrant to search his automobile.

Although petitioner at first denied that the automobile was his, the agents were able to open the car with his key. A paper bag containing marihuana was found in the car. The marihuana was given to a government chemist for analysis, and the bag was delivered to a government fingerprint expert for examination (R. 7–11, 13–15).

On August 26, petitioner was turned over to the city authorities and a complaint was filed against him (R. 12, 16). On August 29, after petitioner left the municipal court, on the tenth floor of the police station, he was taken into custody by federal agents and arraigned on the federal charge before a United States Commissioner on that same date (R. 15, 18). A federal narcotics agent appeared before the municipal judge on August 29 at which time petitioner's municipal case was continued to August 31, when it was dismissed on the motion of the agent (R. 16, 17).

On August 29, in the corridor on the tenth floor of the police station, in the presence of federal narcotics agents, petitioner was asked by the deputy collector if he could produce an order form required by section 2591 (d) of Title 26 of the United States Code and petitioner replied, "No." From that time up until April 9, 1951, the day the trial began (R. 5), the deputy collector had never received from petitioner the required order form (R. 19–21, 22).

A government chemist who, in his previous experience, had made several thousand analyses of materials for the purpose of determining whether or not they were marihuana, testified that the substance taken from the paper bag found in petitioner's automobile was marihuana, being a green, flaky substance containing cystolith hairs. It contained leafy tops, and a material other than the bare stalk of the plant, Cannabis sativa, and other than the seeds, stems, and fibers of that plant (R. 28, 30, 42). Four separate chemical tests corroborated the microscopic physical examination disclosing that the substance being tested was marihuana (R. 34–35, 43).

A government fingerprint expert testified that petitioner's right ring fingerprint, taken the day after he was first arrested (R. 45), was identical with the corresponding print on the paper bag found in petitioner's automobile (R. 48-49).

ARGUMENT

1. There is no merit in petitioner's principal contention that, since the Government did not offer direct evidence as to the place where the marihuana was transferred to him, there was a failure to prove venue, so that the court was without jurisdiction (Pet. 9–14).

The presumption of guilt arising from the possession of unstamped drug packages, under 26 U. S. C. 2553 (a) (*supra,* pp. 2–3), is similar to the presumption of guilt flowing from the

possession of marihuana, absent the required order form, under 26 U. S. C. 2593 (a) (*supra*, pp. 3–4) (R. 66, Pet. 11). In cases arising under what is now 26 U. S. C. 2553 (a), it has been uniformly held that the possession of the proscribed drugs constitutes prima facie evidence, not only of illegal purchase, but of venue. *Casey* v. *United States*, 276 U. S. 413, 417–418; *United States* v. *Pisano*, 193 F. 2d 355, 360 (C. A. 7); *United States* v. *Chiarelli*, 192 F. 2d 528, 532 (C. A. 7), certiorari denied, 342 U. S. 913; *Anderson* v. *United States*, 189 F. 2d 202, 204–205 (C. A. 6); *Frazier* v. *United States*, 163 F. 2d 817, 818 (C. A. D. C.), affirmed, 335 U. S. 497; *Acuna* v. *United States*, 74 F. 2d 359, 360 (C. A. 5); *Killian* v. *United States*, 29 F. 2d 455, 456 (C. A. D. C.).[1] The cases on which petitioner relies (Pet. 9–10, 12)[2] were disapproved and in effect overruled in *Casey* v. *United States*, *supra*, 276 U. S. at 417–418.

2. There was not, as petitioner contends (Pet. 14–18), a failure of proof under 26 U. S. C. 2593

[1] There is a similar result as to proof of venue arising from the presumption under 21 U. S. C. 174 (35 Stat. 614, as amended, 43 Stat. 657). *United States* v. *Pisano*, *supra*; *Mullaney* v. *United States*, 82 F. 2d 638, 641 (C. A. 9). See the Government's Brief in Opposition, p. 20, in *Stoppelli* v. *United States*, No. 264, O. T. 1950, certiorari denied, 340 U. S. 864.

[2] *De Bellis* v. *United States*, 22 F. 2d 948 (C. A. 7), certiorari denied, 276 U. S. 634; *De Moss* v. *United States*, 14 F. 2d 1021 (C. A. 7); *Brightman* v. *United States*, 7 F. 2d 532 (C. A. 8).

(a), as to the "reasonable notice and demand by the collector" for production of the order form for the transfer of marihuana, which he was required to have and to preserve under 26 U. S. C. 2591 (a) and (d) (*supra*, p. 3).

The court below was clearly correct in interpreting the word "notice" as requiring "only that the demand should be brought to the notice of the possessor of the marihuana so that he might be able to produce the order which would show his possession to be the result of a legal transfer to him" (R. 66). Cf. *United States* v. *Markham*, 191 F. 2d 936, 938 (C. A. 7). The statute does not particularize the precise form of the notice and demand, and does not require the deputy collector to identify himself (see Pet. 17) to the person involved before making the demand. When the deputy collector asked the petitioner, while in the custody of the federal narcotics agents, if he could produce the order form required by section 2591 (d) of Title 26, United States Code, his reply was, "No." There is no basis for the speculation (see Pet. 15) that petitioner did not know what was meant.[3] Hav-

[3] The fact that the deputy collector on cross-examination did not recall the number of the order form is immaterial, since, as the trial court pointed out, the "statute does not specify any form number" (R. 23). Neither is there here a situation similar to that in *Kalos* v. *United States*, 9 F. 2d 268, 271 (C. A. 8) (see Pet. 16), where the evidence was uncontradicted that the accused could not understand English.

ing just left the municipal court room after a hearing on a narcotics charge, and then being taken into custody by federal narcotics agents on the federal charge, petitioner must have known that the order form was related to narcotics. There is nothing in the record to show that he asked for a more detailed explanation as to the provisions of section 2591 (d) or that he consulted an attorney regarding this. If he had in his possession the required order form, there was ample time to produce it long before the trial of his case, some eight months later.

Not having produced evidence showing that he had obtained an order form as provided in section 2591, there was a presumption that petitioner had not complied with this section. 26 U. S. C. 2597 (*supra*, p. 4). The burden of proof was upon him to show that he had the required order blank, and not upon the Government to prove negatively that the marihuana found in his possession was not transferred to him pursuant to a written order on the blank required by section 2591. Cf. *United States* v. *Williams*, 161 F. 2d 835, 837 (C. A. 2); *Rossi* v. *United States*, 289 U. S. 89, 91.

3. Petitioner is in error in contending (Pet. 18–20) that the Government failed to prove that the marihuana was an illegal product within the definition given in 26 U. S. C. 3238 (b) (*supra*, pp. 4–5). The testimony of the government chemist was clearly sufficient. He stated that he ex-

amined a green, flaky substance containing cystolith hairs and leafy tops; and that it contained a material other than the seeds, stems, and fibers. Further, four chemical tests corroborated the microscopic physical examination showing that the substance tested was marihuana (R. 30, 34–35, 42, 43). Although the printed record does not contain the trial court's charge to the jury, the decision below discloses that, at the request of petitioner's counsel, the jury was required to find that the substance found in his possession was marihuana within the statutory definition.[4]

4. There was no undue limitation of the cross-examination of the government chemist by petitioner's counsel (Pet. 19–20). To the contrary, the trial court's latitude regarding this was "liberal," as the court below stated (R. 69). It was improper to ask the witness questions in the fields of botany and pharmacy, in neither of which he claimed to be an expert, and objections thereto were properly sustained (R. 41–42). The trial court, however, liberally overruled numerous government objections to extending the scope of the cross-examination (R. 31, 32, 36, 40). The fact that the chemist did not determine whether the marihuana was male or female, what part of the

[4] At a colloquy during the cross-examination of the government chemist, the government attorney made this invitation to petitioner's counsel: "If he has any experts who will come in and say it is not marihuana, let him bring them in" (R. 32). However, petitioner did not offer any such evidence.

world it came from, whether the seeds were sterilized, and whether the marihuana was mature (see Pet. 20), do not reach the basic question as to whether the substance was within the statutory definition.

CONCLUSION

No conflict of decisions or question of general importance is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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